

9 FAM 40.207 Notes

(TL:VISA-181; 11-20-1998)

9 FAM 40.207 N1 Title IV of Cuban Liberty and Democratic Solidarity (Libertad) Act—General

(TL:VISA-181; 11-20-1998)

Title IV, §401 of Pub.L. 104-114 of the Cuban Liberty and Democratic Solidarity (Libertad) Act (hereinafter the “Libertad Act”) [see 9 FAM 40.207 Related Statutory Provisions] makes excludable from the United States, upon determination of the Secretary of State, either through denial of a visa or exclusion at the port of entry, any alien who has confiscated property of United States nationals or who traffics in such property after the enactment date of the law, which was March 12, 1996. The purpose of this section of the Libertad Act was to discourage foreign investment in expropriated properties in Cuba, the claims to which are owned by U.S. nationals. In addition to any one individual who meets the definition of trafficking or confiscation [see §401(b) of the Libertad Act], this exclusion applies to a corporate officer, principal, or controlling shareholder in a company or entity that has been involved in such confiscations or trafficking or, is a spouse, minor child, or agent of any person who has been involved in such trafficking or confiscation.

9 FAM 40.207 N2 Determination of Excludibility Under Libertad Act

(TL:VISA-181; 11-20-1998)

a. The Secretary of State has delegated authority to the Assistant Secretary of State for Inter-American Affairs to make determinations of excludibility and visa ineligibility under §401(a) of the Libertad Act. The Office of Cuban Affairs in the Bureau of Inter-American Affairs at the Department is the central point of contact for all inquiries about implementation of Title IV of the Libertad Act. Determinations of ineligibility and excludibility under Title IV will be made when facts or circumstances exist that would lead the Department reasonably to conclude that a person has engaged in confiscation or trafficking after March 12, 1996.

b. These determinations are made by the Department (ARA) and not by posts. The class code for such refusals is 401, with the annotation “ref-use Helms-Burton” appearing in the free field of the class entry. If, while processing a visa application, information comes to light that suggests an applicant may be involved in confiscation or trafficking, or post is unsure whether the 401 hit relates to the particular applicant, posts should forward the information to the Department, slugged to ARA/CCA, and request a Helms-Burton advisory opinion [see 9 FAM 40.207 PN1 for styling of such

request]. This could occur, for example, if a new spouse had married an individual known to be involved in trafficking, but the new spouse had not yet been entered into the lookout system; or, an individual recently had become an agent for a trafficking entity, but had not yet been entered into the lookout system as such. Consular Officers should note that it is not sufficient in itself for a determination under §401(a) that a person has merely had business dealings with a person for whom a determination is made under §401(a).

c. Any §401(a) determination is entered into the appropriate lookout system. Entry into this system is the exclusive means by which consular officers and the Immigration and Naturalization Service ("INS") will verify that the alien has been determined to be excludable under §401 of the Libertad Act. If the ineligibility determination has been already made, there is no need to refer the case to the Department.

9 FAM 40.207 N3 Notification of Finding of §401(a) Ineligibility or Excludibility Under Libertad Act

(TL:VISA-181; 11-20-1998)

An alien who may be the subject of a determination under §401(a) of the Libertad Act will be sent notification by registered mail from the Office of Cuban Affairs. This notification will inform the alien that his or her name will be entered into the visa lookout system and port of entry exclusion system, and that he/she will be denied a visa upon application or have his/her visa revoked 45 days after the date of the notification letter.

9 FAM 40.207 N3.1 Contesting Finding Under §401(a) of Libertad Act

(TL:VISA-181; 11-20-1998)

a. After receiving notification from the Department, an applicant may, at any time, submit information to ARA/CCA to attempt to show that he/she is not part of a confiscation or trafficking arrangement. If such information leads the Department to reasonably conclude that the applicant or company has not, or is no longer, engaged in confiscation or trafficking, that the original determination was in error, or that an exception applies under §401(b)(2)(B) of the Libertad Act, the Department may review and/or reverse its determination. If such information comes forward within 45 days of the original notification of the exclusion, and the Department determines that the applicant should not be excluded, the applicant's name will not be entered into the lookout system. If the lookout entry has been made, and the Department reverses the decision, however, the Department will notify consular officers and the INS through appropriate channels of the reversal of the original decision and delete the lookout entry from the system.

b. The Department may review a determination made under Title IV at any time, as appropriate, based on receipt of information that may lead to any of the above findings.

9 FAM 40.207 N3.2 Exemptions from Finding Under §401(a) of Libertad Act

(TL:VISA-181; 11-20-1998)

a. The Department (ARA/CCA) may grant an exemption from visa ineligibility for diplomatic and consular personnel of foreign governments and representatives to and officials of international organizations. An applicant may also request from the Department an exemption for medical reasons or for purposes of litigation of an action under Title III of the Libertad Act to the extent permitted under §401(c) of the Libertad Act. The Department may impose appropriate conditions on any exemption granted.

b. Although applicants are to request exemptions from the Department, it is probable that they will submit such requests at consular posts. If the case is time-sensitive (i.e., medical emergencies, travel by foreign officials, imminent court appearances), consular officers should submit the request by immediate cable to the Department, in the same format as an advisory opinion request [see 9 FAM 40. 207 PN1]. In all other cases, the consular officer will provide the applicant with the following address to which he or she is to direct the request:

*Office of Cuban Affairs,
Room 3234
Department of State, Washington, D.C. 20520
(202) 647-7050*

9 FAM 40.207 N3.3 Effect of Divesting from Trafficking Arrangement

(TL:VISA-181; 11-20-1998)

Divesting from a trafficking arrangement averts the exclusion, as specifically excluded from the definition of trafficking is the sale or abandonment of confiscated property in Cuba for purposes of disengaging from Cuba. If the applicant can prove to the Department that he or she divested the property for the purpose of eliminating ties with Cuba, then the §401 ineligibility will be removed.

9 FAM 40.207 N4 Revocations of previously Issued Visa Because of §401 Ineligibility

(TL:VISA-181; 11-20-1998)

Forty-five (45) days after an alien has received the notification letter, the alien's visa will be revoked in accordance with INA 221(i) [see 9 FAM 40.207 Related Statutory Provisions] under the Secretary of State's general authority to revoke visas (assuming the alien has a visa and has not submitted adequate rebuttal evidence within the 45 day period). The revocation is not automatic; however, so the consular officer (or the Department) must first determine if the alien has a valid visa, and then take steps to revoke the visa. Notice of such revocation is accomplished through the notification letter sent in association with the Libertad Act, but the certificate of revocation must still be completed and, if possible, the visa itself must be physically canceled. If the consular officer has reason to believe that the alien in question is already in the United States, the officer should notify the Department, ARA/CCA, and CA/VO/L/A.

9 FAM 40.207 N5 Definitions

(TL:VISA-181; 11-20-1998)

Unless otherwise defined herein, the terms associated with §401 of the Libertad Act are defined as they appear in the Libertad Act (e.g., "confiscate" or "trafficking") or in the Immigration and Nationality Act (e.g., "minor child").

(1) "Agent" means a person who acts on behalf of a corporate officer, principal, or shareholder with a controlling interest to carry out or facilitate acts or policies that result in a determination under §401(a) of the Libertad Act.

(2) "Corporate Officer" means the president; chief executive officer; principal financial officer; principal accounting officer (or, if there is no accounting officer, the controller); any vice president of the entity in the charge of a principal business unit, division or function (such as sales, administration or finance); or any other officer or person who performs policy-making functions for the entity. Corporate officers of a parent or subsidiary of the entity may be deemed corporate officers of the entity if they perform policy-making functions for the entity.

(3) "Principal" means:

(a) When the entity is a general partnership, any general partner and any officer or employee of the general partnership who performs a policy-making function for the partnership;

(b) When the entity is a limited partnership, any general partner and

any officer or employee of a general partner of the limited partnership who performs a policy-making function for the limited partnership;

(c) When the entity is a trust, any trustee and any officer or employee of the trustee who performs a policy-making for the trust; and

(d) Any other person who performs similar policy-making functions for an entity.

(4) "Shareholder with a controlling interest" means a person possessing the power, directly or indirectly, to direct or cause the direction of the management and policies of the entity through the ownership of voting securities.

(5) "Transactions and uses of property incident to lawful travel in Cuba" are such incidental transactions and uses of confiscated property as are necessary to the conduct of lawful travel in Cuba [see 9 FAM 40.207 Related Statutory Provisions, §401(b)(2)(B)(iii)].

9 FAM 40.207 N6 Other Inquiries by Alien Regarding §401 Ineligibility

(TL:VISA-181; 11-20-1998)

Any inquiry received by a consular officer outside the context of a visa application, as may be likely from aliens who have been notified of their excludibility or who are concerned that the Department is building a case against them, should be referred to the Office of Cuban Affairs [see 9 FAM 40.207 N3.2].